Supreme Court, U. S.
FILED
AUG 2 1978
MICHAEL RODAK, JR., CLERK

No. 77-1741

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK WADE HOLLADAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of his convictions for conducting a liquor business without payment of federal taxes and for filing false income tax returns, contending that the evidence was insufficient to support the verdict and that the district court admitted testimony petitioner alleges to have been perjured.

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was found guilty on two counts of conducting a retail liquor and beer business without paying federal taxes, in violation of 26 U.S.C. 5691(a), and two counts of filing false federal income tax returns, in violation of 26 U.S.C. 7206(1). The court sentenced petitioner to a total of four years' imprisonment, to be followed by four years of supervised probation. The court of appeals affirmed (Pet. App. A1-A6).

The evidence showed that a retail beer and liquor business was being carried on at a service station owned by petitioner but ostensibly leased to a third party and that no special federal taxes were paid on this business, in violation of 26 U.S.C. 5691(a). Petitioner's 1972 income tax return reported total gross receipts of less than $28,000, including $19,262 from farm operations (Tr. 33-35, 58).[1] His 1973 return reported gross receipts of less than $42,000, including farm receipts of $25,568 and receipts from the sale of used cars of $14,674 (Tr. 37-38). According to the government's expert witness, Government Exhibits 5(a) and 5(b) (two notebooks seized by federal officials at the service station, pursuant to a search warrant) showed that petitioner had received approximately $87,000 in each of the years 1972 and 1973 from the sale of beer and whiskey, none of which was reported on his income tax returns (Tr. 766-768). Most of the entries in the seized notebooks were in petitioner's handwriting (Tr. 702-709, 740-743).

1. Petitioner argues (Pet. 22-24) that the evidence was not sufficient to support his conviction for conducting a liquor and beer business without paying the special taxes because there was no showing that he was the "manager or master mind" (Pet. 23) behind the sale of beer and whiskey at the service station. But as the court of appeals pointed out (Pet. App. A5), the evidence showed that petitioner bought, under false names, wholesale quantities of beer and liquor, personally resold them on one occasion, and frequently endorsed checks received from their sale at his service station, where an illicit retail liquor and beer dealership was admittedly conducted, and that on one occasion petitioner concealed part of the liquor

[1]"Tr." refers to the transcript of trial proceedings.

inventory in the trunk of his car. This evidence, coupled with the books of account, amply supported petitioner's convictions for conducting a liquor business without paying the special taxes. See *Hale* v. *United States*, 149 F. 2d 401 (C.A. 5), certiorari denied, 326 U.S. 732.

2. Petitioner further contends (Pet. 18-21) that the evidence was insufficient to support his conviction for filing false income tax returns. However, the evidence that petitioner failed to report any income from his liquor operation justified the inference that such conduct was not inadvertent but a deliberate plan to hide such income from the government. Although petitioner suggests (Pet. 18-19) that he may not have received the illicit income, the evidence, as we have described above, showed the following: petitioner sold beer at the station, and checks given to others at the station for the purchase of beer were endorsed by petitioner; part of the station's liquor inventory was found in the trunk of petitioner's car; petitioner bought both beer and liquor under two fictitious names; and according to the books of account in petitioner's handwriting found at the service station, more than $87,000 in each year was realized from the liquor and beer sales. On this evidence, the jury was amply justified in concluding that petitioner managed the entire illicit liquor operation and that he received the proceeds of the sales.[2]

[2]Petitioner properly concedes (Pet. 20) that proof of a tax deficiency is not an essential element of the offense of filing a false income tax return. See, *e.g.*, *United States* v. *DiVarco*, 484 F. 2d 670 (C.A. 7); *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1); *United States* v. *Jernigan*, 411 F. 2d 471 (C.A. 5), certiorari denied, 396 U.S. 927.

3. Contrary to petitioner's argument (Pet. 9-16), he was not deprived of a fair trial by the admission of testimony of a witness who had testified differently in the past and who further testified that he was in physical fear of petitioner. The witness, Tackett, had given testimony in a prior related proceeding that was favorable to petitioner and that was inconsistent with his testimony at trial.[3] But as the court of appeals pointed out (Pet. App. A3-A4), there was no impropriety because the prosecution had no reason to believe his trial testimony to be untrue. It was accordingly for the jury, which was in possession of all the facts relating to the inconsistencies, to decide whether to give credence to Tackett's trial testimony.[4]

Nor was there any impropriety in the government's elicitation of the fact that Tackett was in physical fear of petitioner. The testimony in question was not offered on the basis that petitioner had placed his character in issue (cf. *United States* v. *Crawford*, 438 F. 2d 441 (C.A.8)), but because petitioner, once having vigorously cross-examined the witness about his prior inconsistent testimony favorable to petitioner, had opened the door to a question by the government on redirect examination to elicit the reason for the prior testimony, which the witness was acknowledging as false. Under these circumstances, the evidence was admissible for its relevance to Tackett's

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[3]Because of Tackett's position as an accomplice who had admitted changing his testimony and who had been subpoenaed by both the prosecution and the defense, the district court properly called him as a witness of the court and permitted both parties to cross-examine him.

[4]*Mooney* v. *Holohan*, 294 U.S. 103, *Napue* v. *Illinois*, 360 U.S. 264, and the other cases relied upon by petitioner (Pet. 10-15), are distinguishable. While they hold that the government may not knowingly use perjured testimony to obtain a conviction, there was no knowing use of perjured testimony in this case.

credibility, which petitioner himself had injected into the case. Rules 403 and 404(b), Fed. R. Evid.; *United States* v. *Gerry*, 515 F. 2d 130, 140 (C.A. 2); *United States* v. *Cirillo*, 468 F. 2d 1233, 1240 (C.A. 2); *United States* v. *Tramunti*, 513 F. 2d 1087 (C.A. 2); *United States* v. *Pritchard*, 458 F. 2d 1036 (C.A. 7), certiorari denied, 407 U.S. 911; *Hanger* v. *United States*, 398 F. 2d 91, 105 (C.A. 8).

4. Petitioner further contends (Pet. 21-22) that the district court erred in admitting into evidence Government Exhibits 5(a) and 5(b), the two notebooks seized at the service station pursuant to a search warrant, because they were not shown to constitute business records. But these books were the essence of business records. They contained a series of dated entries covering the period encompassed by the indictment (Tr. 540, 760-765), they were a single entry accounting system maintained since 1967 showing cash receipts and disbursements (Tr. 783-784), and they contained a column headed "income" that reflected the various sources of income, including beer and whiskey sales, and a column for amounts paid out for various named expenses. Moreover, most of the entries were in petitioner's handwriting (Tr. 702, 704-709, 740-743).[5]

United States v. *Ragano*, 520 F. 2d 1191, 1200 (C.A. 5), upon which petitioner relies (Pet. 22), does not cast doubt upon the admissibility of these books as business records. There, the court enumerated the requirements it had previously set forth in *Sabatino* v. *Curtiss National Bank of Miami Springs*, 415 F. 2d 632, 635-636 (C.A. 5),

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[5]Since most of the entries were in petitioner's own handwriting, they would in any event be admissible as an admission by a party. See Fed. R. Evid. 801(d).

certiorari denied, 396 U.S. 1057: (1) the records must be kept pursuant to some routine procedure; (2) they must be kept for motives that would tend to assure accuracy; and (3) they must not themselves be mere cumulations of hearsay or uninformed opinion. Here, the court of appeals properly held (Pet. App. A5-A6) that the records met all three requirements of *Sabatino* and that the "trial court did not abuse its discretion in admitting them either under Rule 803(6) or Rule 901 of the Federal Rules of Evidence."

5. Finally, petitioner claims (Pet. 16-18) that the counts of the indictment were improperly joined and that his motion for a severance should have been granted. But joinder of the two liquor tax offenses with the false income tax return charges was proper under Fed. R. Crim. P. 8(a) because all four counts were based on a series of connected acts and transactions, all arising out of a single bootlegging operation at petitioner's service station. Since most of the evidence on each count was admissible on the other counts, the district court did not abuse its discretion in denying petitioner's motion for a severance (Fed. R. Crim. P. 14).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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[6] *Bradley* v. *United States*, 433 F. 2d 1113 (C.A. D.C.), and *Drew* v. *United States*, 331 F. 2d 85 (C.A. D.C.), upon which petitioner relies (Pet. 17), do not support his claim for a severance. In *Bradley*, the court rejected the defendant's attempt to sever two related housebreaking charges. In *Drew*, the court remanded the case with instructions to hold separate trials where, unlike the instant case, the two offenses did not arise out of the same transaction, series of transactions, or continuing state of affairs. See 331 F. 2d at 93-94.